No. 16309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

WM. H. NEBLETT,
649 South Olive Street,
Los Angeles 14, California,

E. W. MILLER,
1127 Wilshire Boulevard,
Los Angeles 17, California,

Counsel for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

The General Tenor of Appellee's Brief as Affected by the Recent Decision of This Court in Reynolds v. United States.

Counsel for appellant respectfully state that appellee has made no attempt to answer the main points set out in appellant's brief. As an example, only one of the 15 cases, cited and relied upon by appellant in his brief, is referred to in appellee's brief and that reference is an indirect one. The indirect reference appears on page 58 of appellee's brief, where one of the principal cases relied upon by appellant, *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457, is cited to the point that appellant indulged in his brief in "nice calculations" in presenting attorney Sweeney's incompetence at the trial. Counsel for appellee takes the phrase, "nice calculations," from a statement in

the opinion of the Supreme Court in the *Glasser* case. The phrase, *nice calculations,* as used in the *Glasser* case, militates strongly against the Government here, as shown by the full quotation:

> "The right *to have the assistance of counsel is too fundamental and absolute* to allow *courts*[1] to indulge in *nice calculations* as to the *amount of prejudice* arising from its denial." (315 U. S. 76, 62 S. Ct. 467.)

Counsel for appellee, in effect, concede that attorney Sweeney's representation of the defendant was inadequate by saying on page 58 of appellee's brief that Sweeney's representation of appellant would have been effective *"had he not been involved in the state court incident."* Whatever *nice calculations* have been made cannot be laid at appellant's door because appellant has not presented any. On the contrary, appellee's counsel have consumed 20 pages (Appellee's Brief, pp. 38-58) where they indulge only in *nice calculations* in the endeavor to present in appellee's brief the very points which the Supreme Court has said in the *Glasser* case cannot be *indulged in by courts to determine the amount of prejudice arising out of the denial by a court of the effective assistance of counsel.*

The mere perusal of the substantial and damaging evidence of the acts of omission and commission of attorney Sweeney (Appellant's Brief, Point III, pp. 46-50) at the trial will establish that it is the appellee who has indulged in *nice calculations* to avoid the effect of attorney Sweeney's inadequate defense of appellant.

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[1]All emphasis ours unless otherwise specified.

Although the indictment charges the defendant with a violation of Section 371 of Title 18, U. S. C., the conspiracy section, in Count One of the indictment, the Government now admits that the charge was an error and that it was intended by the Government that the five counts in the indictment on which the appellant was convicted, including the conspiracy count, were brought under Section 174 of Title 21, U. S. C. (Appellee's Brief, p. 2.) Appellee contends that the doubt as to which section under which the conspiracy count was brought was resolved by the discussion in chambers reported on pages 511 to 512 of the reporter's transcript. There, the Court expressed a doubt as to whether or not the conspiracy section or the narcotics section applied. The Court resolved the doubt in its own mind by reading Section 174, Title 21, U. S. C., to the jury. No mention was made of Section 371, Title 18, U. S. C. [Rep. Tr. p. 618, line 14, to p. 619, line 11.] This was prejudicial error in the instructions which, appellant believes, requires the reversal of his conviction on all five counts upon which he was convicted. If attorney Sweeney, as he apparently did, allowed the instruction to be given without protest, another item is added to the long list of Mr. Sweeney's inadequacies in the defense of the appellant. The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation;* to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*"

The case was tried on the theory that the plaintiff was charged with a conspiracy, under Section 371 of Title 18, U. S. C. At this late date, the Government cannot switch to Section 174 on Count One. The Government's switch shows that the *defendant was not informed of the nature and cause of the accusation against him,* as required by the Sixth Amendment, and that his conviction on the conspiracy count should be reversed, and along with the reversal of appellant's conviction on Count One, *it seems that his conviction on the four substantive counts should fall* as all of the overt acts charged in the conspiracy count have been translated into the substantive charges contained in the remaining five counts of the indictment. The insufficiency of the evidence to sustain the conviction of appellant on any one of the five counts of the indictment on which he was convicted is presented between pages 51-57 of appellant's brief.

> *Hallman v. United States* (U. S. C. A. D. C., 1953), 208 F. 2d 825, 827.

The recent decision by this Court in *Reynolds v. United States,*[2] No. 16249, was handed down June 1, 1959, since appellee's brief was filed. Counsel for appellant believe that the *Reynolds* case furnishes a complete answer to appellee's brief. This is so because appellee's argument is devoted largely (Appellee's Brief, pp. 38-59) to an attempt to answer the point made in appellant's opening brief (pp. 34-50), *that appellant was not allowed to have counsel of his own choosing,* and that attorney Sweeney was, in effect, *forced upon him by the lower court.* Counsel for appellant feel that it is established by the record that appellant was denied the right under the Sixth Amendment

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[2]Not yet reported.

to be defended by *counsel of his own choice* within the meaning of the decision in *Reynolds v. United States, supra.*

The *Reynolds* case, which we believe to be controlling here, stated the requirements of the Sixth Amendment as it applies to the representation of a defendant in a criminal case by *counsel of his own choosing* in the following language:

> "The record is clear that appellant attempted *to dismiss his local counsel following the order of the district court refusing a continuance of the trial, which appellant sought in order to enable counsel from the mainland to represent him.* The record is further clear that the appellant sought to represent himself at the trial, but the district court refused him the right to do so and insisted upon appellant's representation at the trial by the local counsel.
>
> "In our view the district court erred, in the circumstances of this case, by denying appellant the right to conduct his own defense. As this Court, speaking through Judge James Alger Fee, stated in *Duke v. United States,* 255 F. 2d 721, at page 724 (certiorari denied 78 Sup. Ct. 1561): *'There are two principles which are founded on reason and authority in this field to which this Court gives full weight.* First, an accused has an unquestioned right to defend himself. (Citing Title 28, U. S. C. A. Section 1654.) *Second, an accused should never have counsel not of his choice forced upon him.* (Citing *Adams v. United States,* 317 U. S. 269, 279.) *This Court has never failed to recognize either of these fundamental rights.'* "

II.

Appellant's Fundamental Rights Were Violated When the Court Forced Him to Go to Trial With Attorney Sweeney as His Counsel.

The appellee seeks to meet this principle stated by Judge James Alger Fee in *Duke v. United States,* 255 F. 2d 721, 724, and adopted in *Reynolds v. United States, supra,* by relying upon the principle that ordinarily the granting of a continuance is within the sound discretion of the trial court, and that an abuse of that discretion must be shown in order to obtain a reversal. (Appellee's Brief, pp. 38-59.)

The circumstances under which the denial of appellant's motion for a continuance was had are such in this case that *the ordinary rule* requiring the showing of an abuse of discretion *does not apply.* That appellee is relying upon the ordinary rule is shown by the authorities it cites to support its main argument that there was no abuse of discretion in the denial of the motion for continuance. (Appellee's Brief, pp. 38-58.) That appellee has assumed such a posture is shown by the following cases from this Court, which are cited and relied upon by appellee:

In *Williams v. United States* (9 Cir., 1953), 203 F. 2d 85, cited at page 44 of appellee's brief, the court granted a continuance for 13 days because of the illness of counsel. At the conclusion of the 13 days, counsel's motion for another continuance was denied on the ground that it had not been shown that within that 13 days defendant had attempted to obtain substitute counsel. The attorney, though claiming to be ill, appeared at the time of trial and made a motion for another continuance, which was denied. Upon the denial of the continuance, the attorney conducted the defense in a vigorous and alert manner.

In *Hudson v. United States* (9 Cir., 1956), 238 F. 2d 167, cited at page 44 of appellee's brief, it does not appear from the opinion on what ground the motion for continuance was made, but apparently it was made for some other reason than that urged by appellant Stein, namely the right under the Sixth Amendment of a defendant to be *represented at the trial by counsel of his own choosing.*

In *Sherman v. United States* (9 Cir., 1957), 241 F. 2d 329, 337-38, cited at page 44 of appellee's brief, a motion for continuance on the ground that the defendant had not been given time to confer with his court-appointed attorney was denied because the record showed that the court appointed Mr. Kimball counsel for defendant on September 7, 1954, and that on September 17, 1954, 10 days later, when the case was called, defendant's counsel announced that he would be ready to go to trial on September 21. The case went to trial on September 21. The defendant raised on appeal that he had been denied due process of law guaranteed him by the Sixth Amendment, in that he was denied effective aid of counsel of his own choice. The motion was based upon the ground that defendant was deprived of the right to consult with his court-appointed counsel. The record failed to bear him out.

In *Thomas v. United States* (9 Cir., 1958), 252 F. 2d 182, cited on page 45 of appellee's brief, the question of a continuance was not involved. Shortly after resumption of trial following a noon recess, the attorney for defendant Thomas requested an early adjournment that afternoon on the ground that he was not feeling well. The trial proceeded until around 4:00 o'clock in the afternoon, when the prosecution rested. The attorney for the defendant said that he planned to call one or perhaps two

witnesses. The court replied that he wanted to hear the witnesses that afternoon. The attorney, Mr. Schultz, said that he would ask for a recess at that time for about 5 minutes to go to the restroom to relieve himself. The court suggested 15 or 20 minutes. The attorney asked for about 25 minutes to make his decision. Whereupon, 25 minutes recess was granted, after which the trial was resumed. Defendant made a second claim of error that the trial court erred in refusing to grant the motion for an early adjournment because more time was needed for counsel to prepare for the defense. The court held that in the circumstances shown by the record, the recess for the period suggested by the counsel for the defendant and the failure of the court to grant an adjournment at that stage of the trial to the next day to allow counsel to prepare the defense was not error.

The *Thomas* case is extensively quoted from at page 45 of appellee's brief. The quotation seems to us to answer the argument of appellant on the question of abuse of discretion in the denial of appellant Stein's motion for a continuance in order that he might have other counsel than Sweeney represent him. The part of the quotation from the *Thomas* case on page 45 of appellee's brief, to which we refer, is as follows:

> "The case of *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 465, 86 L. Ed. 680, upon which appellant principally relies, bases its holding as to 'Assistance of Counsel' upon a showing that *some* prejudice resulted to the defendant by the appointment of one of his attorneys to represent one of his codefendants. It is from this basis that the Supreme Court in the *Glasser* case held that it was unnecessary for the defendant to show *exactly* wherein

> he was prejudiced and that any interference with the defendant's right to effective assistance of counsel was sufficient to constitute a denial of effective assistance of counsel." (252 F. 2d, p. 183.) (Emphasis by Court.)

We do not feel that a discussion of the cases cited from other Circuits by appellee on this point is required. The principles are well covered by the cases from this Circuit, which have been distinguished above. Further, we rely upon the *Glasser* case, the *Thomas* case and the *Reynolds* case to show that the appellant Stein was denied the *effective assistance* of counsel in this case. The *Thomas* case holds, following the *Glasser* case, that it is unnecessary for a defendant to show *exactly wherein he was prejudiced* and that any interference with the defendant's right to effective assistance of counsel *is sufficient* to constitute a denial of *effective assistance of counsel.* These subjects are all fully discussed under Point I of Argument, pages 34-44 of appellant's opening brief, to which we refer, in the interest of brevity.

Appellee states at page 39, *et seq.,* of its brief, that appellant's opening brief is replete with statements which are not supported by the record. Two items are presented to support appellee's claim. The first is that the appellant included as an appendix to his brief two newspaper articles which contained stories of attorney Sweeney's arrest by state officials for peddling narcotics and for bribery in connection therewith; the second is the charge that appellant's statement that attorney Sweeney appeared at the opening of the trial for the sole purpose of getting a continuance is not mentioned in the record. We feel that we were justified in attaching the newspaper articles as an appendix to the brief, for the reasons which we stated

in footnote 5 on page 36 of appellant's brief. Attorney Sweeney based his motion on 3 grounds, the third one of which is important here.

Attorney Sweeney said in making his motion for continuance:

> "Thirdly, there is a question of the recent publicity which I have received in this affair over on the state side *by my arrest* in this—what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.
>
> * * * * * * * *
>
> "I felt that because of the nature of this kind of charge and the publicity that this case might get, *it might materially affect any defense* that I might have as to *my action* if I were to be connected in any way to any sort of situation like that.
>
> The Court: *That occurred several weeks ago?*
>
> Mr. Sweeney: *It occurred two weeks ago.*" [Rep. Tr. p. 7, line 11, to p. 8, line 2.]

The above remark of the court that Sweeney's arrest by the state authorities *had occurred several weeks ago* shows that the Judge knew of the publicity which Sweeney mentioned as constituting the reason why Sweeney *was totally incapable, mentally and physically, of going on with the trial because the publicity in this case could materially affect his own defense to the state action.*

We contend now, as we did in our opening brief, that it was the duty of the Judge, under *Glasser v. United States,* 315 U. S. 60, 76, 62 S. Ct. 457, 467, and *Von Moltke v. Gillies,* 332 U. S. 708, 724, 68 S. Ct. 316, 323,

to have acted on his knowledge of the publicity or to have inquired in particularity of attorney Sweeney concerning it, after Sweeney had mentioned the matter of the publicity to the Court. The Court owed the duty to appellant to grant the continuance sought by appellant and not compel Sweeney to go on with the defense when it was plain to all from the record that Sweeney *could not in the circumstances do justice to himself and to his client;* and it was the duty of the Judge in such a case to grant a continuance on the grounds sought by Sweeney, or deny it only after a penetrating and *comprehensive examination of all of the circumstances, including the newspaper publicity,* under which an appellant was forced to accept Sweeney as his counsel. (*Glasser v. United States, supra; Von Moltke v. Gillies, supra.*)

The cases of *Glasser* and *Von Moltke* clearly make it the duty of the Judge to have inquired into what Sweeney meant by the publicity *surrounding his arrest by the state authorities* and whether or not he, Sweeney, *could serve two masters at the trial, himself and his client,* which, it is obvious from Sweeney's own statements, *he could not do without injury to himself in his own defense of the state charges.*

No reason appears from the record why Mr. Harry A. Weiss, the attorney of record for appellant, designated by praecipe signed by appellant and Mr. Weiss April 7, 1958, should not have been called into the case to defend appellant when Sweeney declared his fear of hurting himself by the defense of appellant at the trial. The Court directed the clerk to call Mr. Weiss and have him come into the court, otherwise, the Court said it would send the United States Marshal for Mr. Weiss. The Court afterwards relented and passed the matter by saying, "I

sort of have a feeling that Mr. Weiss is playing horse with the courts." [Rep. Tr. pp. 67-68.]

The second statement which the appellee claims to be unsupported by the record is that there is nothing in the record to show that Mr. Sweeney was appearing for the sole purpose of making the motion for a continuance. At the outset of the trial, counsel approached the bench and Mr. Sweeney said:

> *"Your Honor, this is a motion to continue this matter, based on three reasons."*

Then followed the three reasons, the third of which is quoted above. [Rep. Tr. pp. 4-11.] During the progress of the discussion, when the Court said, "we will go to trial this morning," Mr. Sweeney replied, *"I would like the record to indicate that I am totally, both mentally and physically, unable to go to trial."* [Rep. Tr. pp. 9-10.] All of this adds up to the fact that Sweeney appeared solely for the purpose of obtaining the continuance so that appellant could get other counsel, as he, Sweeney, was both mentally and physically totally unable to go to trial that morning because of the fear that, *if he did defend the appellant, he would be serving two interests, those of himself first, and his client second.*

That the motion for new trial should have been granted upon the same grounds as those stated for the continuance is fully set forth in Point II of the Argument, Appellant's Brief, pages 44-46. We also contend, under Point II of appellant's brief, that appellant Stein was denied due process of law by forcing him to present his motion

for new trial within some 19 hours after he was convicted, when Rule 33 of the Federal Rules of Criminal Procedure gave him 5 days after the verdict within which to make the motion. The quotation on page 58 of appellee's brief, from Rule 33 of the Federal Rules of Criminal Procedure, that, "a motion for new trial based on any other ground shall be made within 5 days after verdict or finding of guilty . . .," is misleading unless the whole of Rule 33 is considered. Rule 33 is as follows:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. *A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty* or within such further time as the court may fix during the 5-day period."

The quotation as it stands in appellee's brief is misleading for two reasons. The phrase, *any other grounds,* refers to grounds other than newly discovered evidence on which a motion for new trial may be made within two years after final judgment. The motion here *was not made* on the ground of *newly discovered evidence.* [Tr. p. 68.] The main ground of the motion for new trial was that the Court erred in denying the appellant's motion for continuance in order for him to secure counsel

other than Sweeney. Appellant was denied due process of law and the equal protection of the laws by the courts forcing him to make his motion for new trial within 19 hours after the verdict of the jury was returned.

We respectfully contend that the judgment should be reversed.

Respectfully submitted,

Wm. H. Neblett and

E. W. Miller,

Counsel for Appellant.